Supreme Court, U. S.
FILED
MAY 4 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-1684

THE CITY OF NEW YORK,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

W. BERNARD RICHLAND
Corporation Counsel of
the City of New York,
Attorney for Petitioner,
Municipal Building
New York, New York 10007
(212) 566-3326

SAMUEL J. WARMS,
CORNELIUS F. ROCHE,
of Counsel.

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INTRODUCTORY STATEMENT

The petitioner, the City of New York, respectfully prays that a writ of certiorari issue to review a judgment and order of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 11, 1976, which judgment affirmed the judgment of the United States District

Court for the Southern District of New York on the opinion of that District Court. The District Court judgment dismissed petitioner's complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

OPINION BELOW

The Court of Appeals did not render an opinion. The District Court rendered an opinion on May 14, 1975 which is reported in Volume 394 of the Federal Supplement at page 641. A copy of that opinion appears in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 11, 1976, and this petition will be filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. May the Federal Government impose taxes on the City of New York for air transportation by the City's officials and employees on governmental business?

2. Is the complaint in an action for refund of these taxes, which alleges that the airline travel was a part of and necessary to the performance of required governmental duties, sufficiently specific so that it can be assumed to include and permit proof of, duties which were both uniquely governmental and an exercise of the delegated sovereignty of the State of New York?

3. Can the tax in question, after the repeal of a provision excluding State and local governments from tax, be considered a "user charge", where an amount equal to the tax proceeds was appropriated to the Airport and Airway Trust Fund but might be removed from that Fund at any time by an act of Congress?

4. Assuming, arguendo, that the tax is a "user charge", can it be imposed on the City where:

a. The travel involved is in the performance of (I) uniquely governmental duties, or (II) duties which are uniquely governmental and an exercise of state sovereignty; or

b. There is no known relationship between the the amount of the tax paid by, and the value or cost of the benefits bestowed by the taxing authority upon, the taxpayer?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution:

No specific constitutional provision is involved; rather the case involves application of the doctrine of intergovernmental immunities as enunciated in the decisions of this Court.

Internal Revenue Code:

Section 4261, subdivision (a) reads as follows:

> "(a) In general.- There is hereby imposed upon the amount paid for taxable transportation (as defined in section 4262) of any person which begins after June 30, 1970, a tax equal to 8 percent of the amount so paid. In the case of amounts paid outside of the United States for taxable transportation, the tax imposed by this subsection shall apply only if such transportation begins and ends in the United States."

Section 4262 reads in part as follows:

> " * * * the term 'taxable transportation' means * * * (1) transportation by air * * *."

Section 4292, as amended by Public Law 91-258, 84 Stat. 219, §205(a)(2), reads as follows (the material in brackets was deleted by the 1970 Act):

> "4292. State and local governmental exemption. Under regulations prescribed by the Secretary or his delegate, no tax shall be imposed under section 4251 [or 4261] upon any payment received for services or facilities furnished to the Government of any State, Territory of the United States, or any political subdivision of the foregoing or the District of Columbia."

Airport and Airway Revenue Act of 1970:

Section 208 of this Act (P.L. 91-258, 84 Stat. 250, 49 U.S.C. §1742) reads in pertinent part as follows:

"Sec. 208. Airport and Airway Trust Fund.

(a) Creation of Trust Fund.-- There is established in the Treasury of the United States a trust fund to be known as the "Airport and Airway Trust Fund' (hereinafter in this section referred to as the "Trust Fund'), consisting of such amounts as may be appropriated or credited to the Trust Fund as provided in this section.

(b) Transfer to Trust Fund of Amounts Equivalent to Certain Taxes.-- There is hereby appropriated to the Trust Fund--

(1) amounts equivalent to the taxes received in the Treasury after June 30, 1970, and before

July 1, 1980, under subsections (c) and (d) of section 4041 (taxes on aviation fuel) and under sections 4261, 4271, and 4491 (taxes on transportation by air and on use of civil aircraft) of the Internal Revenue Code of 1954;

(2) amounts determined by the Secretary of the Treasury to be equivalent to the taxes received in the Treasury after June 30, 1970, and before July 1, 1980, under section 4081 of such Code, with respect to gasoline used in aircraft; and

(3) amounts determined by the Secretary of the Treasury to be equivalent to the taxes received in the Treasury after June 30, 1970, and before July 1, 1980, under paragraphs (2) and (3) of

section 4071(a) of such Code, with respect to tires and tubes of the types used on aircraft.

The amounts appropriated by paragraphs (1), (2), and (3) shall be transferred at least quarterly from the general fund of the Treasury to the Trust Fund on the basis of estimates made by the Secretary of the Treasury of the amounts referred to in paragraphs (1), (2), and (3) received in the Treasury. Proper adjustments shall be made in the amounts subsequently transferred to the extent prior estimates were in excess of or less than the amount required to be transferred."

STATEMENT OF THE CASE

The complaint in this case, alleges that certain City officials and employees who travel on official City governmental business paid the excise tax on their airline fares

imposed by Internal Revenue Code §4261 and were reimbursed for those payments by the City.

During the period July 1, 1970 to May 31, 1972, the City, as a result of such reimbursement paid to the United States of America, the respondent, $80,500, for these excise taxes on the airline fares of its officials and employees.

On July 23, 1972, the City of New York filed a refund claim in that amount and on September 7, 1972, at the request of the United States Internal Revenue Service, filed amended claims for refund aggregating the same amount. On January 19, 1973, the Internal Revenue Service notified the City that its claims for refund were rejected.

On or about April 3, 1974, the petitioner commenced this action for a refund of those taxes in the District Court, pursuant to 28 U,.S.C. §1346(a)(1). On motion

of the respondent, the District Court dismissed the complaint with prejudice. The Court of Appeals affirmed the judgment of dismissal.

REASONS FOR GRANTING THE WRIT

The Decisions Below

The complaint alleged that employees of the City had used airplane travel in the prosecution of necessary governmental business. It did not specify whether or not that business, or which part of it, was uniquely governmental or the exercise of state sovereignty. Neither did the complaint state any facts which could be construed to negate that uniqueness or sovereign quality. The first of these two characteristics is required, if the tax is not discriminatory, by the minority opinion of Justice FRANKFURTER in New York v. United States, 326 U.S. 672.(1946); the second by the minority opinion of Chief

Justice STONE in that case. While each of these opinions expressed dissatisfaction with the then existing doctrine which denied or granted immunity depending upon whether the activities taxed were proprietary or governmental, the two opinions were, as we shall show more fully later, in irreconcilable conflict.

Despite this, and despite the lack of specific allegations describing the precise kinds of activities involved, the District Court viewed New York v. United States, supra as "[a] particularly crushing blow to the pre-existing doctrine." The Court then purported to apply the conditions set forth for immunity in both the opinions of Justice FRANKFURTER and Chief Justice STONE. It found that the City met none of those criteria, stating "it is clear that the excise tax is neither discriminatory nor does it unduly interfere with the governmental functions

of New York City."

We are unable to understand how the District Court could, on the bare complaint, conclude that none of the taxed transactions described in the broadest of terms in that complaint, met the criteria formulated in those two inconsistent minority opinions. There were no answers to interrogatories to describe the nature of those transactions. There was nothing in the nature of a bill of particulars to describe them. All that the pleading said, was that they were governmental in nature. That could have meant that they were "uniquely governmental" within the meaning of Justice FRANKFURTER's opinion. It could have meant that they were pure exercises of sovereignty - as, indeed in many instances they were - e.g. travel to a distant state by a police officer to return a person in extradition proceedings - thus meeting Chief Justice STONE's criteria;

or, as in the case of extradition, they could have met the criteria of both opinions.

The District Court's opinion was, thus, a non sequitur. Because the Court of Appeals affirmed expressly on the District Court's opinion, it too, engaged in the same non sequitur.

1. THE DECISION BELOW IS BASED ON THE DISPARATE AND CONFLICTING REASONING OF TWO MINORITY OPINIONS IN THIS COURT. THIS COURT'S HOLDING IN NEW YORK V. UNITED STATES, 326 U.S. 672 (1946) BECAUSE OF THE DIVERSE VIEWS OF THE JUSTICES, CALLS FOR CLARIFICATION SO THAT STATES AND THEIR POLITICAL SUBDIVISIONS CAN BE PROPERLY GUIDED IN THE CONDUCT OF THEIR AFFAIRS.

The case of New York v. United States, 326 U.S. 672 (1946), involved the tax on mineral waters imposed by §615(a)(5) of the Revenue Act of 1932, 47 Stat. 169, 264. New York resisted imposition of such a tax

on its sale of mineral waters obtained from Saratoga Springs in that state, and sought their refund. Aside from the argument that the preservation of the springs at Saratoga related to the accomplishment of the governmental function of conservation, the case presented a simple question of whether the activity taxed was a proprietary one or a governmental one. Under the law as it had been developed up to that point, it was clear - the conservation argument aside - that no immunity from taxes could be bestowed on an activity so essentially proprietary and non-governmental. Mr. Justice FRANKFURTER, in his opinion said: "On the basis of authority, the case is quickly disposed of", citing South Carolina v. United States, 199 U.S. 437 (1905), Ohio v. Helvering, 292 U.S. 360 (1934), Helvering v. Powers, 293 U.S. 214 (1934) and Allen v. Regents, 304 U.S. 439

(1938). But in that opinion, which was concurred in only by Justice RUTLEDGE, Justice FRANKFURTER, expressing dissatisfaction with those authorities, sought to set forth a new doctrine of immunity which in essence permitted the Federal government to tax a state when the tax involved did not discriminate against the state, i.e. was applicable to the state as well as private parties, provided that it did not impinge upon state activities which partake of "uniqueness from the point of view of intergovernmental relations" (326 U.S. at p. 582).

Chief Justice STONE wrote a concurring opinion for a plurality of the Court.* He agreed with Justice FRANKFURTER that a new formulation of the rule of immunity was needed.

*Justices REED, MURPHY and BURTON concurred with Justice STONE. Justice JACKSON took no part in the case. Justices BLACK and DOUGLAS dissented.

But he disagreed sharply with the notion which would permit taxation of the States so long as the tax was non-discriminatory. Instead he set up yet another set of criteria for tax immunity which, in summary, would proscribe taxes which would "interfere unduly with the State's performance of its sovereign functions of government," or "impair the sovereign status of the State". (326 U.S. at p. 587).

The Courts below had little difficulty in wrestling with these inconsistent views. Perhaps they felt that one of them would eventually emerge as the rule of this Court, not considering that this Court might have a different formulation of its own. Then they simply, and wrongly, assumed that the City's undisclosed and undelineated taxed activities met neither of these criteria.

While those Courts may have experienced little difficulty in dealing with two disparate minority opinions, the States and their political subdivisions experience no such ease in evaluating and applying them. New York v. United States, 326 U.S. 672 (1946) remains an unexplained enigma and the latest important word of this Court in the area of state tax immunity. It creates difficulties of a kind that are exemplified by the case at bar. Strictly speaking, the opinions of Justices STONE and FRANKFURTER, at best, constitute obiter dicta. On its facts, New York v. United States is no more than a holding which follows the previously developed rule which immunized governmental transactions but taxed those of a proprietary nature. It did not solve or resolve any of the problems to which that rule gave rise. Nor did it do anything more

than express dissatisfaction with that rule. Because of the disharmony between Justice FRANKFURTER'S and Chief Justice STONE'S criteria, the case did not even lay down proper guidelines for future action.

In the present confused state of the law, those guidelines are necessary for the proper conduct of the affairs of the states and their political subdivisions. We believe that the present case offers an opportunity for this Court to settle the law in this presently confused area.

In the work entitled, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, prepared pursuant to P.L. 91-589, 84 Stat. 1585; 2 U.S.C. §168, by the Congressional Research Service, Library of Congress (1973), in treating of the scope of State immunity from federal taxation, the authors state

(pp. 131-132):

> "Although there have been sharp differences of opinion among members of the Supreme Court in recent cases dealing with tax immunity of state functions and instrumentalities, it has been stated that 'all agree that not all of the former immunity is gone.' Twice, the Court has made an effort to express its new point of view in a statement of general principles by which the right to such immunity shall be determined. However, the failure to muster a majority in concurrence with any single opinion in the more recent of these cases leaves the question very much in doubt.
>
> * * * * *

The second attempt to formulate a general doctrine was made in New York v. United States, where, on review of a judgment affirming the right of the United States to tax the sale of mineral waters taken from property owned and operated by the State of New York, the Court reconsidered the right of Congress to tax business enterprises carried on by the States. Justice Frankfurter, speaking for himself and Justice Rutledge,

made the question of discrimination vel non against state activities the test of the validity of such a tax. They found 'no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter.' In a concurring opinion in which Justices Reed, Murphy, and Burton joined, Chief Justice Stone rejected the criterion of discrimination. He repeated what he had said in an earlier case to the effect that '...the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax...or the appropriate exercise of the functions of the government affected by it.'"

We do not know whether this Court, should it grant this petition, will adhere to the earlier "proprietary versus governmental" rule, whether it will accept Justice FRANKFURTER'S formulation or Chief Justice

STONE'S or whether it will chart a different formulation of its own. Our chief interest is that the present uncertainty in this field be dispelled and replaced by a doctrine by which the States and their political subdivisions may be guided.

We also believe that, whatever criteria may result from a decision of the case at bar, many of the City's activities subjected to the tax will be found to partake of the sovereign immunity which the City seeks.

2. RESOLUTION OF THE QUESTION RAISED IN THIS CASE WILL AID IN THE SOLUTION OF A RECURRENT PROBLEM FOR ALL OF THE STATES AND MANY OF THEIR POLITICAL SUBDIVISIONS.

The uncertainty which presently pervades the field of governmental immunity

presents problems not only for the petitioner, whose problem may be, as we shall later show, exacerbated by the rule of collateral estoppel, but for all of the other states and their political subdivisions as well. Air travel is the means most frequently used in today's conduct of business, including governmental business. We think it is no exaggeration to surmise that every state government uses it, and every one of those governments, if the decision below is to be followed, is taxable on its travel. Whether the burden of taxation on the state governments is large or small is aside from the point. The uncertainty created by the decision below as well as that in State of Texas v. United States, 72-2 U.S. Tax Cas., ¶16,048, at 86,128 (W.D. Tex., 1972) aff'd Mem. 73-1 U.S. Tax Cas., ¶16,085 at 81,394

(5 Cir., 1972), of which more will be said later, casts an administrative burden on those government units, for until it is affirmed or reversed or until the proper guidelines are outlined by this Court, those governments, like the petitioner, will be under a recurrent obligation to file claims for refund of taxes paid on air transportation.

We urge this Court to grant a writ of certiorari in this case so that the atmosphere may be cleared of its murkiness. Whatever this Court may decide, its decision will have the salutary virtue of certainty, which will be of enormous help to the governments affected.

3. THE CITY OF NEW YORK, HAVING LOST ITS CASE BELOW, WILL BE ESPECIALLY DISADVANTAGED IN ANY LATER ATTEMPTS TO SEEK REFUND OF AIR TRANSPORTATION TAXES IN THE ABSENCE OF A DECISION BY THIS COURT OR A STATUTORY CHANGE, BECAUSE THE DOCTRINE OF COLLATERAL ESTOPPEL MAY BE ASSERTED TO FORECLOSE FUTURE REFUNDS.

The tax in question is a recurring tax and not an isolated instance of the application of a tax law. The City continues and will continue to use air travel. It will continue to pay the tax on that travel. It will, indeed it has, continue to seek a refund of the taxes which it pays. It will continue to have those refund applications denied and will continue to bring

actions to review those denials.

Those actions, in the absence of a decision by this Court, in this or another case, may be doomed to dismissal by the assertion of the doctrine of collateral estoppel which this Court has applied in tax cases. In the absence of new judicial decisions or trends, that doctrine may preclude fruitful litigation for later periods, of the issue decided with respect to the instant tax period. See Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev 1 (1942); Tait v. The Western Maryland Ry. Co., 289 U.S. 620 (1933); cf. Commissioner v. Sunnen, 333 U.S. 591 (1948).

This potential plight of the petitioner, when viewed in the light of the dubious quality of the holdings below, and the uncertainty that exists in fore-

casting this Court's ultimate view, presents a further reason for the exercise of this Court's discretionary jurisdiction in granting the writ which we seek.

4. IF THE CONSTITUTIONAL ISSUE IS NOT REACHED BECAUSE THE TAX IN QUESTION IS VALID AS A "USER CHARGE", THAT ISSUE SHOULD BE PASSED UPON BY THIS COURT.

Neither of the Courts below dealt with the respondent's argument that the tax in question is validly imposed as a "user charge". Decision was based entirely on the constitutional issue. But the United States had also relied on the case of State of Texas v. U.S., 72-2 U.S. Tax Cas., ¶16,048, at 86,128 (W.D. Tex., 1972) aff'd mem. 73-1 U.S. Tax Cas., ¶16,085, at 81,394 (5 Cir., 1972).

The District Court concluded that although that case related mainly to the "user charge" issue, it contained dicta which followed the "nondiscriminatory" test of Justice FRANKFURTER in New York v. United States.

The intrusive "user charge" issue is, we believe, based on an untenable foundation. Nevertheless, if it presents a means of resolving taxability in this case, that resolution is as important to the states and political subdivisions which pay these taxes as would be the more desirable resolution of the constitutional issue. If this case is reviewed, its eventual decision will, regardless of its basis, erase the uncertainty which the present confused state of the law has created.

We think there is little merit to the "user charge" argument. In the Texas case, counsel for the state accepted the characterization and agreed in its Stipulation of Facts that "The excise taxes***represent a user charge***"(72 USTC at p.86129).

The question raised is simply whether the creation by the 1970 legislation of an Airport and Airway Trust Fund (p. 2, 91-258, §208, 84 Stat. 250, 49 USC §1743), which was supported by appropriations reflecting the amounts of the air transportation taxes collected, converted what had for years been a tax, into a charge. In the report of the House Committee which recommended the repeal of the provision exempting states and their subdivisions from the tax, we find the genesis of the thought that the tax was a charge. That

statement said (U.S. Code Cong. Ad. News, 91st Cong. 2d Sess., Vol. 2, (1970):

> "***this tax is now generally viewed as a user charge." (Underscoring supplied)

The lack of foundation for this statement is matched only by its inaccuracy. It was plainly inaccurate because it was made before the 1970 legislation was passed, before the trust fund was set up, before the Internal Revenue Code was amended and yet it said that the tax which had always been a tax is now; i.e., at the time of the report, viewed as a charge. The statement conflicts with the whole super-structure of the government's argument which is to the effect that the 1970 legislation converted what had been a tax into a charge. The Committee's words indicate

that it had always been a charge, or, at least, it had come to be considered a charge, even before there was a trust fund.

The taxes in question were originally enacted in 1942 as taxes, and so remained as taxes. The language by which they are imposed was not changed substantially by the 1970 legislation which repealed the exemption. The law still calls them taxes. They are still part of the Internal Revenue Code and are subject to all of that Code's applicable procedural provisions, most of which call the imposts taxes. To call them charges when nothing was done to the statute imposing them to change their character from the taxes which they were is utterly unrealistic.

While it may be proper to advert to Committee reports to resolve an ambiguity, there is no ambiguity in the statute under consideration. The report of the committee which calls the tax a user charge on at least 150 separate occasions speaks of the tax as a tax. [U.S. Code, Cong. Ad. News, 91st Cong., 2d Sess., Vol. 2, 3076 to 3125, (1970)]. If the Congress had intended to convert what had always been a tax into a user charge, it could have readily done so by appropriate language in the statute which it was considering and passing, not in its committee report.

Nor do we believe that even had the tax been designated as a charge in the legislation, it could have been levied against activities which consti-

tute an exercise of the states' sovereign duties.

In two recent cases, reported under the title of Evansville Airport v. Delta Airlines, 405 U.S. 707 (1972), it was held that states and their political subdivisions which operated airports might impose a head tax on passengers departing from those airports. Normally, such taxes would have been an unconstitutional impairment of the right to travel under the Privileges and Immunities Clause (U.S. Const., Art. IV, §2), or the Commerce Clause (U.S. Const., Art. I, §8, Cl.3). Crandall v. State of Nevada, 73 U.S. (6 Wall.) 35 (1867), and the Passenger Cases, 48 U.S. (7 How.) 283 (1849). But in upholding these imposts, which were to be used

for the improvement and maintenance of the airports, this Court was careful to find that the charges made were a fair, albeit imperfect, approximation of the value of the use of the facilities by those upon whom they were imposed. In short, the charges were found to be not excessive in relation to the costs incurred in providing the services to which they were related. We believe that even were the tax involved here to be considered a charge rather than a tax, it would not be sustained without a showing that the amount of the so-called charges bore a fair relationship to the benefits received by the governmental taxpayers. To sustain its tax in this case, there must be some factual background of which the

Court can take judicial notice to show the commensurateness of the services rendered and the charges imposed. There is no such factual background.

CONCLUSION

A writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

April 30, 1976

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Petitioner
City of New York

Samuel J. Warms
Cornelius F. Roche,
of Counsel.

Opinion of Cannella, D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CITY OF NEW YORK,
Plaintiff,

-against-

UNITED STATES OF AMERICA,
Defendant.

Appearances:

W. Bernard Richland, Corporation Counsel of the City of New York (Samuel J. Warms and Raymond Herzog, Asst. Corp. Counsels, of counsel), for plaintiff.

Paul J. Curran, U.S. Attorney for the Southern District of New York (John S. Siffert, Asst. U.S. Attorney, of counsel), for defendant.

CANNELLA, D.J.:

This action was commenced by the City of New York pursuant to 28 U.S.C. §1346 for the refund of certain excise taxes which

have been paid to the Federal Government. The sole issue presented for our determination is whether the excise tax on amounts paid for transportation of persons by air under § 4261 of the Internal Revenue Code, 26 U.S.C. §4261, may constitutionally be imposed on city expenditures for employees traveling on official city business. As we find that the constitutional doctrine of intergovernmental tax immunity does not bar the imposition of this tax, the motion of the United States to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) is hereby granted.

THE FACTS

The City claims that during the period of July 1, 1970 through May 31, 1972 certain of its employees traveled by air while conducting necessary, official New York City

business. These employees purchased and paid for air transportation and such air fare included the federal excise tax specified in § 4261. The employees were later reimbursed by the City for the expenses incurred.

On July 23, 1972, the City filed a claim for refund of the taxes now in suit-$80,500. On January 19, 1973, the Internal Revenue Service notified the City that its claim had been rejected. Thereafter, on April 3, 1974, the instant action was commenced.[1]

THE STATUTORY SCHEME

The excise tax provision here at issue (§ 4261), while a long-standing part of the

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[1] The action appears to have been timely filed under 26 U.S.C. § 6532(a)(1) and venue is proper, 28 U.S.C. § 1402(a)(2).

Code, was significantly amended as part of the Airport and Airway Revenue Act of 1970;[2] legislation which was passed in conjunction with the Airport and Airway Development Act of 1970.[3] The stated purpose of these enactments was to aid in the substantial expansion, improvement and development of the American airport and airway system in order to meet future needs and demands for these facilities.[4]

With regard to the instant dispute, the changes which the 1970 Act effected upon

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2 Title II, Pub.L. 91-258, 84 Stat. 236 (effective July 1, 1970).

3 Title I, Pub.L. 91-258, 84 Stat. 219

4 See, § 2, Title I, Pub.L. 91-258; supra; H. Rep. No. 91-601, 91st Cong., 1st Sess. in 1970 U.S. Code Cong, and Admin. News at 3047 and 3082.

§ 4261[5] are not as important

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5 In its present form, §4261(a) of the Code states:

> (a) IN GENERAL.-There is hereby imposed upon the amount paid for taxable transportation (as defined in section 4262) of any person which begins after June 30, 1970, a tax equal to 8 percent of the amount so paid. In the case of amounts paid outside of the United States for taxable transportation, the tax imposed by this subsection shall apply only if such transportation begins and ends in the United States.

§4262, in turn, defines "taxable transportation" as "transportation by air" and further states:

> (a) TAXABLE TRANSPORTATION; IN GENERAL.-For purposes of this part, except as provided in subsection (b), the term "taxable transportation" means-
>
> (1) transportation by air which begins in the United States or in the 225-mile zone and ends in the United States or in the 225-mile zone; and
>
> (2) in the case of transportation by air other than transportation described in paragraph (1), that portion

(Footnote continued on following page)

(Footnote continued from preceding page)

of such transportation which is directly or indirectly from one port or station in the United States to another port or station in the United States, but only if such portion is not apart of uninterrupted international air transportation. . . .

(C) DEFINITIONS.-For purposes of this section-

(1) CONTINENTAL UNITED STATES.-The term "continental United States" means the District of Columbia and the States other than Alaska and Hawaii.

(2) 225-MILE ZONE.-The term "225-mile zone" means that portion of Canada and Mexico which is not more than 225 miles from the nearest point in the continental United States.

(3) UNINTERRUPTED INTERNATIONAL AIR TRANSPORTATION.- The term "uninterrupted international air transportation" means any transportation by air which is not transportation described in subsection (a)(1) and in which-

(A) the scheduled interval between (i) the beginning or end of the portion of such transportation which is directly or indirectly from one port or station in the United States to another port or station in the

(Footnote continued on following page)

as the impact which it had upon §4292 of the Code (26 U.S.C. §4292). Prior to July 1, 1970 (the effective date of the amendments), §4292 exempted from the excise tax imposed under § 4261 "any payment received for services or facilities furnished to the Government of any State, Territory of the United States, or any political subdivision of the foregoing or the District of Columbia." The Airport and Airway Revenue Act of 1970, however, deleted the reference to § 4261 from § 4292,[6] thus completely withdrawing

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United States and (ii) the end or beginning of the other portion of such transportation is not more than 6 hours, and

(B) The scheduled interval between the beginning or end and the end or beginning of any two segments of the portion of such transportation referred to in subparagraph (A) (i) is not more than 6 hours. ...

[6] Prior to the 1970 amendment §4292 stated:

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from the law the previous statutory grant of immunity accorded to New York City and other political entities. The rationale for this legislative decision is made abundantly clear in the House Report, which states:

> Present law provides a series of exemptions from the tax on transportation of persons by air. These include exemptions: . . . (5) for transportation furnished to the United States (at the discretion of the Secretary of the

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> Under regulations prescribed by the Secretary or his delegate, no tax shall be imposed under section 4251 or 4261 upon any payment received for services or facilities furnished to the Government of any State, Territory of the United States, or any political subdivision of the foregoing or the District of Columbia.

§205(a)(2) of the Airport and Airway Revenue Act of 1970 (Title II, Pub.L. 91-258, 84 Stat. 236) deleted the phrase "or 4261" from the statute. (§ 4251 imposes a tax on certain communications services, such as telephone services, and is not here relevant.)

> Treasury) and to State and local governments. . . .
>
> The Ways and Means Committee has deleted most of these exemptions either as obsolete provisions or as unnecessary complications of existing law. . . .
>
> . . . .
>
> . . . .
>
> The exemptions for transporation furnished to State and local governments, the United States, and nonprofit educational organizations are terminated. . . . It did not seem appropriate to continue special exemptions for these governmental and educational organizations since this tax is now generally viewed as a user charge. In this situation there would appear to be no reason why these governmental and educational organizations should not pay for their share of the use of the airway facilities. Moreover, should these exemptions be retained where now applicable, it would be difficult to see why other equally meritorious nonprofit organizations should not also be granted exemption.

H. Rep. No. 91-601, 91st Cong., 1st Sess. in 1970 U.S. Code Cong. and Admin. News at 3090-91

/ For further discussion of the legislative

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Hence, under the present statutory scheme the only basis upon which the City might avoid the air transportation excise tax is under the constitutional doctrine of intergovernmental tax immunity.

INTERGOVERNMENTAL TAX IMMUNITY

The City premises its present claim upon the assertion that "a political subdivision of a state which exercises governmental functions may not be subjected in performing those functions to a federal tax."[8] Thus, it relies upon the intergovernmental tax immunity which is said to arise by implication from

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history of the provisions at bar, see, Texas v. United States, 72-2 U.S. Tax Cas. ¶ 16,048 at 86,128 (W.D. Tex. 1972), aff'd mem., 73-1 U.S. Tax Cas. ¶ 16,085 at 81,394 (5 Cir. 1972).

[8] City's Brief at 8.

the federal constitution; a doctrine which finds its origin in McCulloch v. Maryland, 17 U.S. 316 (1819). The doctrine enjoyed great success and was frequently invoked by courts during the late nineteenth and early twentieth centuries and it is upon the case law generated during this earlier period that the City places principal reliance.[9] However, as Professors Freeland and Stephens have observed: "Despite its

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[9] In chronological order, the cases cited by the City are: Collector v. Day, 78 U.S. 113 (1870); South Carolina v. United States, 199 U.S. 437 (1905); Ohio v. Helvering, 292 U.S. 360 (1934); Helvering v. Gerhardt, 304 U.S. 405 (1938); Allen v. Regents of the University System of Georgia, 304 U.S. 439 (1939); and Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939). These decisions, together with other leading immunity cases and New York v. United States, 326 U.S. 572 (1946), are digested and discussed in: E. Barrett & P. Bruton, Constitutional Law 483-495 (4th ed. 1973); P. Kauper, Constitutional

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bold beginning and vigorous earlier life, the doctrine of intergovernmental immunity has suffered a marked decline over the past half century." J. Freeland & R. Stephens, Fundamentals of Federal Income Taxation 247 (1972). A particularly crushing blow to the pre-existing doctrine came in 1946, when the Supreme Court decided New York v. United

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Law 452-488 (4th ed. 1972); G. Gunther & N. Dowling, Constitutional Law, 752-765 (8th ed. 1970); W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law, 440-460 (2nd ed. 1967); McCormack, Intergovernmental Immunity and the Eleventh Amendment, 51 N.C.L. Rev. 485, 488-493 (1973). Each of these authors recognizes that the immunity doctrine is only a shadow of its former self and that the courts have, during the more recent years, restricted its scope with each decision.

The leading pre-New York v. United States articles in this area are those of Professor Thomas Reed Powell. Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 633; and The Remnant of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 757 (1945).

States, 326 U.S. 572 (1946). That case stands as the Court's most recent pronouncement in this area and is, in the opinion of this Court, clearly preclusive of the City's claim. The opinions of the several Justices in New York v. United States render the earlier decisions of but historical interest and, to use Professor Griswold's phrase, "the doctrine of immunity was limited" in scope and utility by the views there expressed. E. Griswold, Federal Taxation 29 (6th ed. 1966).

The Court's decision in New York v. United States is itself somewhat curious precedent because no opinion of the Court actually exists. Mr. Justice Frankfurter "announced the judgment of the Court and delivered an opinion in which Mr. Justice Rutledge joined." 326 U.S. at 573. Mr. Justice Rutledge separately concurred and Chief Justice Stone,

joined by Justices Reed, Murphy and Burton, issued a concurring opinion. Mr. Justice Douglas, joined by Mr. Justice Black, dissented. This division of the Court and the policy considerations which are attendant thereon, while of significance in a close case, are without impact in the matter at bar since no difference in result is obtained when the present facts are viewed through either the Frankfurter or Stone formulation.

Mr. Justice Frankfurter, after first noting that Article I, § 9 of the Constitution ("Congress can lay no tax 'on Articles exported from any State'" (326 U.S. at 575)) imposed the only direct constitutional limitation upon the federal taxing power viz-a-viz the states, recognized that other tax immunity doctrines derived

from Chief Justice Marshall's famous phrase "the power to tax involves the power to destroy." Id. at 575-76. The Justice, in an apparent effort to simplify the immunity doctrine and advance a more workable standard, began his endeavor by outrightly rejecting the older premise of reciprocal intergovernmental tax immunity. Placing emphasis upon Mr. Justice Bradley's dissenting opinion in Collector v. Day, 78 U.S. 113, 128-29 (1870), Frankfurter concluded that reciprocity of tax immunities was an unwarranted inhibition upon the federal system of government. Id. at 577-82. In its place, Justice Frankfurter promulgated a new test of tax immunity-a standard which validates a federal tax which falls upon a state entity when the tax is found to be nondiscriminatory.

> There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a State-house; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. If Congress desires, it may of course leave untaxed enterprises pursued by States for the public good while it taxes like enterprises organized for private ends. [Citations omitted.] If Congress makes no such differentiation and, as in this case, taxes all vendors of mineral water alike, whether State vendors or private vendors, it simply says, in effect, to a State: "You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy."

Id. at 582. Moreover, Justice Frankfurter expressly rejected the distinctions previously

drawn between the "governmental" and "proprietary" functions of state and local entities as "to shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion." Id. at 580. He concluded by stating:

> we decide enough when we reject limitations upon the taxing power of Congress derived from such untenable criteria as "proprietary" against "governmental" activities of the States, or historically sanctioned activities of government, or activities conducted merely for profit, and find no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter.

Id. at 583-84 (footnote omitted).

Justice Frankfurter's brethren in the majority refused to accept all of the views that he had offered. Even Justice Rutledge, who concurred in the opinion, felt a need

to express himself separately. Id. at 584-86. Four other Justices, in an opinion by Chief Justice Stone, felt compelled to limit the per se "nondiscriminatory test" formulated by Frankfurter.

While joining Justice Frankfurter in finding "untenable the distinction between 'governmental' and 'proprietary' interests," id. at 586, the Chief Justice expressed his reservations with regard to placing exclusive reliance upon the nondiscriminatory nature of a tax in the following words:

> [W]e are not prepared to say that the national government may constitutionally lay non-discriminatory tax on every class of property and activities of States and individuals alike.
>
> . . .[O]ur difficulty with the formula, now first suggested as offering a new solution for an old problem, is that a federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is

> being taxed, as to interfere unduly with the State's performance of its sovereign functions of government.

Id. at 586-87. The difficulty encountered by the Chief Justice and his colleagues with Frankfurter's formulation is evidenced by the following passage:

> If the phrase "non-discriminatory tax" is to be taken in its long accepted meaning as referring to a tax laid on a like subject matter, without regard to the personality of the taxpayer, whether a State, a corporation or a private individual, it is plain that there may be non-discriminatory taxes which, when laid on a State, would nevertheless impair the sovereign status of the State quite as much as a like tax imposed by a State on property or activities of the national government. Mayo v. United States, 319 U.S. 441, 447-448. This is not because the tax can be regarded as discriminatory but because a sovereign government is the taxpayer, and the tax, even though non-discriminatory, may be regarded as infringing its sovereignty.

Id. at 587. Thus, Chief Justice Stone concluded that the mere nondiscriminatory nature

of a tax would not be enough to sustain its levy upon a state or locality. In addition, the Chief Justice indicated that "we [must] consider whether such a non-discriminatory tax unduly interferes with the performance of the State's functions of government. If it does, then the fact that the tax is non-discriminatory does not save it." Id. at 588.

Returning, then, to the matter at bar, we reiterate that these distinctions are not determinative to the outcome of this case. Clearly, the excise tax imposed by § 4261 of the Code is nondiscriminatory in nature. All users of air transportation facilities (with the limited exception of an international organization of the Red Cross) are equally subject to this tax. We cannot perceive any undue interference

with the sovereign functions of City government as the result of its being compelled to contribute to the federal tax coffers in this particular instance. While it is difficult for us to conceive of a federal tax, other than those suggested in the opinions of the Court (i.e., a tax on statehouses aand cityhalls), which is both nondiscriminatory and yet unduly restrictive against a municipality,[10] it is clear that

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[10] While perhaps not entirely satisfactory, we offer the following example to illustrate this concept: A federal tax on all .38 caliber handguns (or bullets). Such a tax would apply to all who own such pistols: private citizens, detective agencies, and the like, as well as state and local governments. However, owing to the fact that the incidence of .38 caliber handgun ownership is greatest among state and local law enforcement agencies and that the possession of such firearms is vital to their proper functioning, it might well be said that although nondiscriminatory in scope,

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the air transportation excise tax is neither discriminatory nor does it unduly interfere with the governmental functions of New York City. As one commentator has put it, "any challenge to federal taxation of a state [or city] activity would require a showing of actual impairment of state [or city] functions." McCormack, supra n. 9 at 493. Plainly, no actual impairment of the City's functions has been demonstrated in this case.

The statutory exemption previously enjoyed by the City having been abrogated in 1970, we conclude that the constitutional doctrine of intergovernmental tax immunity will not properly assume its place. The City's claim of immunity from the excise

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the tax, if of sufficient magnitude, could indeed unduly interfere with the sovereign functions of government.

tax imposed under § 4261 must be rejected. We add only that our view with regard to New York v. United States is fully supported by the following cases: Murphy v. O'Brien, 485 F. 2d 671, 674-75 (T.E.C.A. 1973); United States v. Washington Toll Bridge Authority, 307 F. 2d 330, 334 (9 Cir. 1962) (en banc), cert. denied, 372 U.S. 911 (1963); Texas v. United States, 72-2 U.S. Tax Cas. ¶ 16,048 at 86, 128 (W.D. Tex. 1972), aff'd mem., 73-1 U.S. Tax Cas. ¶ 16,085 at 81,394 (5 Cir. 1972);[11] Iowa State Univ. of Science

[11] The decision of Judge Roberts in Texas v. United States squarely addresses the question of immunity for states and localities from the § 4261 tax. However, the Judge there placed emphasis upon the user charge aspect of the § 4261 levy, as contrasted with analyzing it as a true tax, and thus concluded that it was "as such . . . outside the scope of the doctrine of implied intergovernmental tax immunity."

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& Technology v. United States, 500 F.2d 508, 523 (Ct. Cl. 1974).

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72-2 U.S. Tax Cas. at 86,131. The Court went further and in what might be considered dictum recognized that

> Even if the airway user charge is considered to be a tax within the general confines of the doctrine of implied intergovernmental tax immunity, plaintiff has now shown that the tax is invalid where it is nondiscriminatory, Congress specifically intended to tax this activity whether or not carried on directly by the State, and there exists no undue burden upon the performance of plaintiff's functions as a government which have long been recognized by the Constitution as sovereign. New York v. United States supra.

As our discussion in the text supra indicates, we are in complete agreement with these views.

CONCLUSION

The motion of the United States pursuant to Fed. R. Civ.P. 12(b)(6) is hereby granted. The Clerk of the Court shall enter judgment dismissing the complaint with prejudice and costs.

It is SO ORDERED.

JOHN M. CANNELLA

United States District Judge

Dated: New York, N.Y.
May 14, 1975.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of February, one thousand nine hundred and seventy-six.

Present:

HON. WILLIAM H. TIMBERS
Circuit Judge
HON. FREDERICK vP. BRYAN
HON. JAMES S. HOLDEN
District Judges Sitting by Designation

CITY OF NEW YORK,

Plaintiff-Appellant,

v.

75-6065

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Cannella dated May 14, 1975.

Wm. H. Timbers
WILLIAM H. TIMBERS
United States Circuit Judge

Frederick vP. Bryan
FREDERICK vP. BRYAN
United States District Judge

James S. Holden
JAMES S. HOLDEN
United States District Judge
Sitting by Designation

FILED
JUL 16 1976
MICHAEL RODAK, JR., CLERK

No. 75-1684

In the Supreme Court of the United States

OCTOBER TERM, 1976

CITY OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1684

CITY OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the constitutionality of the air passenger ticket excise tax provided by Section 4261 of the Internal Revenue Code of 1954 (26 U.S.C.), as applied to its individual employees travelling on official business of the City of New York. In this refund suit brought in the United States District Court for the Southern District of New York, the district court upheld the tax on the authority of *New York* v. *United States*, 326 U.S. 572 (Pet. App. 1a-25a). The court of appeals affirmed without opinion (Pet. App. 26a-27a).

1. Section 4261(a) of the Code imposes a tax equal to eight percent of the amount paid for taxable air transportation.[1] The statute was originally enacted in 1941 as a

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[1]Section 4262 of the Code defines taxable transportation, generally, as domestic air transportation. Section 4261(d) provides that the tax

tax on the transportation of persons by rail, motor vehicle, and water, as well as by air.[2] In 1970, the air passenger tax was the subject of considerable congressional attention in connection with the enactment of the Airport and Airway Development and the Airport and Airway Revenue Acts of 1970, 84 Stat. 219, 236. This legislation provides for substantial expansion and improvement of the airport and airway system to be funded "through the imposition and application of airport and airway user chargers" (H.R. Rep. No. 91-601, 91st Cong., 1st Sess. 1 (1969)), including the air passenger ticket excise tax of Section 4261. See H.R. Rep. No. 91-601, *supra*, at 38; S. Rep. No. 91-706, 91st Cong., 2d Sess. 5 (1970).

The direct link between the Development Act and the excise tax was established by Section 208 of the Airport and Airway Revenue Act, 84 Stat. 250, which created the Airport and Airway Trust Fund. The taxes collected under the Revenue Act, including the air passenger ticket excise tax, were appropriated to this fund, from which the airport development expenditures are to be made. At that time, Congress eliminated the exemptions previously granted to state and local governments and to the federal government (Section 205(a)(2) and (3) of the Airport and Airway Revenue Act, 84 Stat. 241).

2. Petitioner urges (Pet. 10-23) this Court to clarify the law regarding the implied constitutional immunity of

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shall be paid by the person making the payment subject to tax, and Section 4291 requires that the person receiving a taxable payment collect the tax and pay it over to the United States.

[2]Section 3469 of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.), the predecessor to Section 4261 of the 1954 Code, was added by Section 554(b) of the Revenue Act of 1941, 55 Stat. 721. The tax on transportation other than by air was eliminated by Section 5(b) of the Tax Rate Extension Act of 1962, 76 Stat. 115.

the states and their political subdivisions from federal taxation. But as the above-described legislative history of the air transportation excise tax demonstrates, the tax is "a charge for services rendered and represents a quid pro quo, and as such, is outside the scope of the doctrine of implied intergovernmental tax immunity." *State of Texas* v. *United States*, 30 A.F.T.R. 2d 5935, 5938 (W.D. Tex.), affirmed *per curiam*, 31 A.F.T.R. 2d 1473 (C.A. 5). These taxes or "charges" are specifically earmarked for air transportion development, and are paid into the Airport and Airway Trust Fund established solely for that purpose. Moreover, in withdrawing the exemptions from this tax previously extended to various governmental and educational organizations, the House Committee Report stated that "* * * since this tax is now generally viewed as a user charge * * * there would appear to be no reason why these governmental and educational organizations should not pay for their share of the use of the airway facilities." H.R. Rep. No. 91-601, *supra*, at 46. See also 114 Cong. Rec. 8987 (1968).

In substantially analogous cases, this Court has held that charges for services rendered by state and local governments for pilotage or wharfage, even though graduated by tonnage, do not violate Article I, Section 10, Clause 3 of the Constitutuion, which provides that "[n]o State shall * * * lay any Duty of Tonnage." See, *e.g.*, *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261; *Huse* v. *Glover*, 119 U.S. 543; *Packet Co.* v. *St. Louis*, 100 U.S. 423; *Packet Co.* v. *Keokuk*, 95 U.S. 80. Cf. *The Minnesota Rate Cases*, 230 U.S. 352, 405. See also *Head Money Cases*, 112 U.S. 580, 596. Similarly, the Court has upheld state motor vehicle license and registration fees levied as compensation for the use of highway facilities furnished by the state (see *e.g.*, *Hendrick* v. *Maryland*, 235 U.S. 610; *Aero Transit Co.* v. *Commissioners*, 332 U.S. 495). Finally, the Court has sustained state and local enplaning charges

upon commercial airline passengers as compensation for the use of state-provided airport facilities (*Evansville Airport* v. *Delta Airlines*, 405 U.S. 707), against the challenge that, because they were imposed upon vehicles or passengers in interstate as well as intrastate commerce, they interfered with the former. As stated in *Hendrick* v. *Maryland*, *supra*, 235 U.S. at 623-624, "* * * there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor."[3]

Here, too, the passenger ticket tax is a payment by the user for airport and airway facilities furnished by the federal government. Thus, petitioner can no more claim the right to free use of these facilities than it could, for example, post its mail without purchasing stamps.[4]

3. Finally, petitioner's claim that there is an implied immunity of the states and localities from federal taxation has long been discredited. The Court originally recognized such an immunity in *Collector* v. *Day*, 11 Wall. 113, except where the states engage in business of a private nongovernmental character (see, *e.g.*, *South Carolina* v. *United States*, 199 U.S. 437; *Ohio* v. *Helvering*, 292

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[3]Although petitioner complains (Pet. 32-34) that there is no "factual background" to demonstrate that the taxes were commensurate with the value of its use of the airport facilities, the burden was upon it to show that the charges did not bear a reasonable relationship to the services provided. See *Evansville Airport* v. *Delta Airlines*, *supra*, 405 U.S. at 719-720; *Hendrick* v. *Maryland*, *supra*, 235 U.S. at 624.

[4]The district court in *State of Texas* v. *United States*, *supra*, 30 A.F.T.R. 2d at 5938, also sustained the passenger ticket tax as applied to the states as a valid exercise by the Congress of its power to regulate interstate commerce. See *Board of Trustees* v. *United States*, 289 U.S. 48. But that issue need not be reached here in light of the status of the tax as a user charge. Compare *National League of Cities* v. *Usery*, Nos. 74-878, 74-879, decided June 24, 1976.

U.S. 360). But in *Helvering* v. *Gerhardt*, 304 U.S. 405, the Court sustained a federal income tax on salaries of employees of the bi-state Port of New York Authority. In so holding, the Court reaffirmed the distinction drawn by Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, between the position of the national government (acting with powers of supremacy under the Constitution) and the states, which are not accorded such preeminent powers.

Similarly, in *New York* v. *United States*, 326 U.S. 572, upon which the district court relied (Pet. App. 13a-20a), the Court upheld a federal tax upon the sale of mineral water by the State of New York. While the case could have turned upon the distinction drawn in the earlier cases between governmental and private activities, none of the opinions of the members of the Court voting to sustain the tax rested upon that narrow ground. Rather, under the various tests suggested in the plurality opinions, the air passenger tax at issue here would be valid.

Those tests are: (1) whether the tax is nondiscriminatory (326 U.S. at 582-584, Frankfurter, J.); (2) whether Congress expressly stated its intention that the tax apply to governmental organizations (*id.* at 584-586, Rutledge, J.); and (3) whether the tax unduly interferes with the performance of the sovereign functions of government, in the sense of actual impairment of state or city functions (*id.* at 586-590, Stone, C.J.). See also McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 North Carolina L. Rev. 485, 493 (1973). Indeed, it is hardly surprising that shortly after the decision in *New York* v. *United States*, *supra*, one commentator concluded that "since the beginning of 1938, it is apparent that the Court has rejected the reciprocal rule of immunity, returned to the basis of earlier decisions and reaffirmed Chief Justice Marshall's understanding that the immunity

doctrine protected the Federal Government against taxation by the states but did not equally shield the states against the exercise of the delegated and supreme taxing power of the Federal Government." Rakestraw, *The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth*, 11 Fed. Bar J. 3, 27 (1950).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1976.

DOJ-1976-07